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Office of Administrative Law Judges
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Issue Date: 16 May 2003

Case Nos.: **2002-LHC-01245**
2002-LHC-01246

OWCP Nos.: **5-108941**
5-109016

In the Matter of:

CLARENCE L. STRINGFIELD,
Claimant,
v.
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,
Employer (Self-Insured),
and
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-In-Interest.

DECISION AND ORDER AWARDING BENEFITS

This proceeding arises from a claim under the provisions of the Longshore and Harbor Workers' Compensation Act (the "Act"), 33 U.S.C. § 901 et seq.

A formal hearing was held in Newport News, Virginia, on August 1, 2002, at which time all parties were afforded full opportunity to present evidence and argument as provided in the Act and the applicable regulations.

The findings and conclusions which follow are based upon a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations and pertinent precedent.

STIPULATIONS[1]

The Claimant and the Employer have stipulated to the following:

1. That the parties are subject to the jurisdiction of the Longshore and Harbor Workers' Compensation Act;

2. An Employer/Employee relationship existed at all relevant times;

3. That the claimant injured both knees on 11/27/99 while employed by Newport News Shipbuilding;

4. That a timely notice of injury was given by the employee to the employer;

5. That a timely claim for compensation was filed by the employee;

6. That the employer filed a timely First Report of Injury with the Department of Labor and a timely Notice of Controversion;

7. That the claimant's average weekly wage at the time of this injury was $872.35 resulting in a compensation rate of $581.57;

8. That the claimant has been paid temporary total disability benefits from 4/21/00 to 3/10/02 at the rate of $581.57 for a total payment of $57,243.10.

Issues

1. Whether Claimant reached maximum medical improvement (MMI) on his left lower extremity on February 28, 2002?

2. Whether Claimant is permanently and totally disabled from February 28, 2002 and continuing?

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[1] The following abbreviations will be used as citations to the record:

JS	-	Joint Stipulations;
TR	-	Transcript of the Hearing;
CX	-	Claimant's Exhibits; and
EX	-	Employer's Exhibits.

3. Even if the Employer demonstrated the existence of suitable alternate employment, whether Mr. Stringfield would be alternatively entitled to the permanent partial disability rating of 37% as assigned by Dr. Nevins?

Contentions

The claimant reports that each knee joint has been replaced. Dr. Nevins performed both surgeries and this physician

> assigned a 37% lower extremity impairment which is the equivalent of a 15% whole person impairment on July 11,2001. (CX1-4). On February 28, 2002, Dr. Nevins opined that Mr. Stringfield had reached maximum medical improvement.
>
> Dr. Nevins assigned Mr. Stringfield permanent work restrictions limiting his work to sedentary work only. (CX1-18). According to Dr. Nevins, Mr. Stringfield is limited to no vertical or inclined ladders, crawling, kneeling or squatting, stairs only to and from job site, occasional standing, indoor work only, sit or stand at will, no prolonged standing or walking. (CX1-20).

William Kay, the employer's vocational expert has identified four driving jobs.

> Kay admitted that the jobs on his labor market survey do not meet Dr. Nevins' requirement of indoor only work and the ability to stand and sit at will. (CX 10-47).
>
> The Employer states that suitable alternate employment has been available to the Claimant from February 28, 2002 and continuing which he could obtain and perform if he diligently sought it. Therefore, as Claimant has failed to seek such employment, he is not entitled to the permanent total disability benefits which he seeks.

The employer notes that the claimant drove a commuter bus to the shipyard for 23 years, until 1987.

The employer states that during a deposition, Dr. Nevins indicated that patients

> with artificial joints are not made to be on their feet all day. They should not be kneeling and crawling and squatting. They should not be doing heavy lifting. They should not be ascending and descending ladders, and only infrequently would they be ascending and descending stairs. In addition, I feel strongly that patients with artificial joints really should not be exposed to extremes of temperatures and humidity, and they really need to work in an indoor environment where they can sit and stand periodically at will and not be on their feet all day.

Kay has identified driving jobs that he thought were suitable for Stringfield. However, the claimant has not made any attempt to contact those employers or any others. The employer argues that these jobs do not violate the restrictions assigned by Dr. Nevins.

The parties have agreed to an MMI date of February 28, 2002 and that a 37% rating is appropriate for left knee impairment. However, the employer argues that additional compensation is not warranted as suitable alternative employment has been shown.

Evaluation of the Evidence

At the hearing, the claimant testified that he was 64 years old and left school in the eighth grade. He was a painter in the shipyard and he drove a commuter bus to work until 1987.

Stringfield reported that both knee joints had been replaced. He would tire after walking about 40 steps and his left knee was stiffer than the right. He did not feel that he could drive a bus as he had to balance himself when he left a vehicle. (TR 26).

Dr. Nevins performed a right knee joint replacement in October 2000. In July 2001, the physician reported that the claimant had a 37% impairment of the right lower extremity. In October 2001, the claimant underwent a left total knee replacement.

On February 28, 2002, Dr. Nevins stated that the claimant had reached MMI for the left knee. When deposed in May 2002, Dr. Nevins testified that he would assign a rating after a visit in September.

Dr. Nevins reported that

> The restrictions I would assign the patient and assign almost all of my knee replacement patients are those in a form executed on January 22, 2001. Patients with artificial joints are not made to be on their feet all day. They should not be kneeling and crawling and squatting. They should not be doing heavy lifting. They should not be ascending and descending ladders, and only infrequently would they be ascending and descending stairs. In addition, I feel strongly that patients with artificial joints really should not be exposed to extremes of temperatures and humidity, and they really need to work in an indoor environment where they can sit and stand periodically at will and not be on their feet all day. (CX9, p.8).

Q When you say he should not sit -- I'm sorry -- he should not do prolonged standing or walking, how long are you talking about, Doctor?

A There's no absolute amount of prolonged standing and walking.

Q So it would not be unreasonable for Mr. Stringfield to indicate that he can't stand for more than two hours?

A That would not be at all unusual. (P.9).

William Kay was deposed in July 2002. Kay stated that while the claimant had a very limited education there were no restrictions regarding his ability to drive. Three jobs were identified as a school bus driver and there was one position as a van driver. Kay stated that all of the potential employers were willing to work around the claimant's restrictions.

The bus driver jobs required 5 ½ to 6 hours of work per day, and additional work was available. Kay reported that in 2001, Dr. Nevins did not respond to forms describing these jobs.

Kay noted that the claimant could lift 30 pounds and should not have to assist van or bus passengers. Kay acknowledged that the dictionary of occupational titles (DOT) listed school bus driving as requiring a medium level of exertion. A driver would have to close bus windows at the end of a day, open and close doors, and assist elderly or handicapped passengers.

Kay stated that the DOT reported general descriptions of jobs and that employers did not strictly follow the guidelines. Kay conceded that driving was not indoor work and that a driver could not sit or stand at will. (CX 10).

Kay's labor market survey report in July 2002 stated that

> The Labor Market Survey supports the conclusion that Mr. Stringfield is employable in all of the occupations explored. A total of 4 positions were identified that are compatible with Mr. Stringfield's transferable skills and the physical capabilities documented by Dr. Nevins. Copies of the job descriptions were forwarded to Dr. Nevins for review and response. A copy of the job openings was also forwarded to Mr. Stringfield via certified and regular mail.
>
> The survey indicates there have been and there currently are viable employment opportunities available to Mr. Stringfield with a potential wage of $7.65 per hour or $229.25 per week and an average wage of $7.00 per hour or $210.00 per week. Most of these positions have the potential for salary increases over time. (CX10).

Dr. Nevins was deposed in October 2002 and testified that he saw the claimant in the previous month. Flexion in the left knee had decreased from 125 degrees in May to 100 degrees in September. The physician felt that a 37% rating was appropriate for the left leg. Dr. Nevins reported that MMI was reached on February 28, 2002. The examination report was made an attachment to the deposition. (EX 1).

Discussion

The parties agree that Stringfield can not return to his previous job in the shipyard. Thus, the claimant has established a prima facie case of total disability.

> The burden shifts to Employer to demonstrate the availability of suitable alternate employment within Claimant's restrictions and which is available upon a reasonably diligent search. Newport News Shipbuilding and Dry Dock v. Tann, 841 F.2d 540, 542 (4th Cir. 1988); Trans-State Dredging v. Benefits Review Board (hereinafter "Tarner"), 731 F.2d 199, 201 (4th Cir. 1984.).

Kay has stated that some four jobs are available as a driver. Reportedly, the potential employers will work with an applicant to meet his needs. Kay wrote to Dr. Nevins on two occasions seeking approval for these jobs. There was no response from the physician in 2001 and he was not asked pertinent questions during the deposition in late 2002.

Dr. Nevins has not been specific in defining Stringfield's restrictions. Apparently some patients recover more mobility than others. It seems reasonable to assume that Dr. Nevins would place the claimant in a full sedentary category with some ability to perform light work for part of a day.

The DOT lists the identified jobs in primarily a medium class of exertion. There are some light category aspects to these jobs. However, Stringfield would have to close windows, maintain cleanliness on the vehicle, and escort riders on occasion. There would be occasions when he could not change position for an extended period of time.

The undersigned finds that these driving jobs are beyond the claimant's exertional restrictions. While Stringfield has not sought work, he is not required to look for work which is clearly beyond his capabilities.

The parties have now stipulated that the claimant reached MMI on February 28, 2002 and that a 37% rating should be paid for the left leg.

Stringfield was paid temporary total disability from April 21, 2000 until March 10, 2002 according to the stipulations. He is entitled of permanent total disability beginning on March 1, 2002 as he had reached MMI on the prior day and as the employer has not demonstrated that he is capable of suitable alternate employment.

It must be pointed out that the claimant may not be paid the schedular rating of 37% for the left leg while he is receiving total disability benefits. Therefore, this rating can only be paid if and when disability becomes partial rather than total.

ORDER

1. The employer is to pay temporary total disability from April 21, 2000 until February 28, 2002.

2. The employer is to pay permanent total disability from March 1, 2002 and continuing at the compensation rate of $581.57 per week.

3. Employer is hereby ordered to pay all medical expenses related to Claimant's work related injuries.

4. Employer shall receive credit for any compensation previously paid.

5. Interest at the rate specified in 28 U.S.C. § 1961 in effect when this Decision and Order is filed with the Office of the District Director shall be paid on all accrued benefits and penalties, computed from the date each payment was originally due to be paid. See Grant v. Portland Stevedoring Co., 16 BRBS 267 (1984).

6. Claimant's attorney, within twenty (20) days of receipt of this order, shall submit a fully documented fee application, a copy of which shall be sent to opposing counsel, who shall then have ten (10) days to respond with objections thereto.

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RICHARD K. MALAMPHY
Administrative Law Judge

RKM/ccb
Newport News, Virginia